No. 04-6

In the Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

PETITIONERS,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents concede that the Questions Presented are based on three independent circuit conflicts involving the proper interpretation of the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, and its relation to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* They also acknowledge that each of those conflicts presents an issue of recurring national importance. *See* Pet. 28-29; Brief Amicus Curiae of the Chamber of Commerce ("COC Br.") at 10-12. Respondents base their opposition on the claim that "this case does not present this Court with the opportunity to resolve [the] differences that ... exist among the circuits" because Petitioners did not file a motion for injunctive relief before the state action was initiated and Respondents' state court complaint did not seek recovery of funds from an ERISA trust. Opp. 9. The Fourth Circuit, however, did not consider either of those facts to have any bearing on the outcome of the case. It unequivocally held that *no* ERISA action is ever exempt from the AIA unless the federal court *grants* a request for equitable relief before the state action is filed. Thus, this case squarely presents this Court with the opportunity to determine whether that interpretation of the AIA is correct. Indeed, the Fourth Circuit expressly acknowledged the relevance of two of the three conflicts at issue in this petition (and did not address the third). Pet. App. 6-7. Any reasonable interpretation of the conflicting decisions confirms that Petitioners' complaint would not have been dismissed in any of the seven circuits that have rejected the Fourth Circuit's approach.

I. THE *BARANCIK* RULE APPLIES HERE

1. In Respondents' novel view, the rule in *Barancik v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir. 1973), is triggered only when a federal plaintiff files a *motion* for a preliminary injunction or temporary restraining order. Opp. 6-7. That argument is founded on a manufactured distinction between complaints and motions requesting injunctive relief. Respondents cite no case that relies on that supposedly dispositive procedural difference, and there

is nothing to suggest that any circuit ever would. Indeed, the Fourth Circuit plainly did not read the *Barancik* rule as Respondents do. Instead, it agreed with Petitioners' assertion that adoption of the *Barancik* rule would permit their action to proceed, finding that the Seventh Circuit "so held" in *Barancik*. Pet. App. 13a-14a. Similarly, the Fifth and Sixth Circuits, which follow the same rule as the Fourth, also explicitly interpret *Barancik* to apply to any first-filed federal complaint seeking injunctive relief.[1]

As the Fourth Circuit explained, Petitioners' complaint was the relevant pleading under the rule it adopted and under *Barancik*. The court held that the AIA "rendered the district court powerless to issue any of the relief Denny's requested" because the complaint "seek[s] to enjoin state officials." Pet. App. 12a n.8. If requesting injunctive relief in a complaint is enough to trigger dismissal under the AIA, it is also enough to trigger protection under the *Barancik* rule, as the Fourth Circuit recognized. Pet. App. 13a-14a.

Respondents' argument is based on a mistaken reading of *Barancik* that no court has adopted. In *Barancik*, the federal plaintiff filed a complaint "pray[ing] for damages and a declaratory judgment." 489 F.2d at 934. That complaint did not seek injunctive relief. Instead, the first time the plaintiff invoked the court's injunctive powers was when he filed a motion for a preliminary injunction three months later. Because the complaint had not sought injunctive relief, the timing of the motion was crucial to the outcome of the case. Had a state court action been initiated between the filing of the complaint (which did not request injunctive relief triggering the AIA) and the filing of the motion (which did), the AIA would have barred the injunction because the state suit would have predated the request for injunctive

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[1] *See Martingale LLC v. City of Louisville*, 361 F.3d 297, 304 (6th Cir. 2004) (AIA bars injunctive relief when "state court litigation commenced after the federal suit was filed"); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993) ("The *Barancik* court ... held that the Act *does not apply* where the federal suit is filed first."), *cert. denied*, 511 U.S. 1032 (1994).

relief. That chronology explains why then-Judge Stevens stated that "[t]he mere fact that the federal complaint was filed before the state proceeding was commenced is not sufficient to avoid the statutory bar [of the AIA]." *Id.* at 936. Respondents take that passage out of context and misconstrue it to suggest a distinction between complaints and motions, but Judge Stevens drew no such distinction.[2] The relevant difference in *Barancik* was between a request for injunctive relief filed before the relevant state court action and a request filed after that state court action. As Respondents concede, Petitioners requested injunctive relief before Respondents filed their state action. Opp. 2-3.

2. The First and Eighth Circuits have not endorsed Respondents' view either. To the contrary, the analysis in *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988), shows that the First Circuit regarded the filing of the complaint seeking injunctive relief—and not the plaintiff's motion for a temporary restraining order—as the event triggering protection under *Barancik*. The court stated that "[a]t 11:05 A.M. ... Hyde Park filed in the federal district court its verified *complaint seeking declaratory and injunctive relief*." *Id.* at 840 (emphasis added). Later that day, High Voltage "presented a complaint" in state court. The First Circuit held that "[s]uch an action is precisely the sort of state statutory enforcement that Hyde Park sought to enjoin in its *federal action*," and applied *Barancik* to exempt the prior-filed federal action from the AIA's reach. *Id.* at 840-41. That language confirms that a prior-filed federal complaint seeking injunctive relief (like Petitioners' here) is sufficient to avoid the AIA under the *Barancik* rule.

Similarly, in *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982), the Eighth Circuit explicitly

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[2] Respondents note Judge Stevens's citation of *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). Opp. 8. The complaint there sought "a money judgment only." 260 U.S. at 228. The plaintiff filed for injunctive relief only after the state suit was initiated. That is precisely the scenario Judge Stevens distinguished in *Barancik*, which is not present here.

rejected any distinction among various methods of invoking injunctive relief. That court held that "[t]he Anti-Injunction Act is inapplicable when a federal court has first obtained jurisdiction of a matter in controversy *by the institution of suit*." *Id.* at 1127 (emphasis added). The Eighth Circuit made clear that "the question whether state actions are 'pending' is appropriately answered by reference to the date on which injunctive relief is sought in federal court," not (as Respondents claim) the date a motion for preliminary injunctive relief is filed. *Id.* Thus, the First and Eighth Circuits recognize that the *Barancik* rule applies here.

4. Respondents offer no rationale for their manufactured distinction, which is hardly surprising, because their approach would cause the very problems that led Judge Stevens to adopt the *Barancik* rule. *Barancik* explained that the rule was necessary because federal plaintiffs should not be required to seek temporary restraining orders to protect the injunctive powers of federal courts. As if anticipating Respondents' view, Judge Stevens wrote, "It may be argued that the [AIA] requires the federal court to protect its authority by promptly issuing a temporary restraining order. But such a construction might encourage the liberal granting of the kind of protective orders the statute was intended to prevent." 489 F.2d at 937-38. The *Barancik* court contemplated and rejected the idea that motions for preliminary injunctive relief—like motions for temporary restraining orders—should be necessary to secure equitable relief in federal courts. Petitioners would read *Barancik* to require just that.

II. THE SECOND AND SIXTH CIRCUITS WOULD APPLY THE ERISA EXCEPTION

Respondents argue that ERISA is not an "expressly authorized" exception under *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Opp. 10-12. Under Respondents' reading, parties could use the AIA to defeat a cause of action expressly given to ERISA fiduciaries exclusively in federal court (and frustrate ERISA's rule of nationwide uniformity)

simply by filing a state court action before the federal court orders relief. That interpretation of the AIA is surely incorrect, but the only question at this stage is whether review should be granted to resolve this question. Respondents concede that five circuits have considered the issue and adopted conflicting rules. Pet. 19-20. This case squarely presents the opportunity to resolve that conflict.

1. Petitioners' complaint would not have been dismissed under the Second Circuit's holding in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd on other grounds sub nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986). Pet. 21. Respondents do not disagree but suggest that precedent should be disregarded because the court's analysis was not extensive. It was sufficient for the Fourth Circuit, however, which explicitly acknowledged that *Gilbert* conflicts with its interpretation of the AIA. *See Employers Resource Mgt. Co. v. Shannon*, 65 F.3d 1126, 1132 (4th Cir. 1995) (noting that "[o]ther circuits are divided on the issue of whether ERISA carves an exception into the Anti-Injunction Act" and citing *Gilbert* for the proposition that "ERISA constitutes an exception to the Anti-Injunction Act"), *cert. denied*, 516 U.S. 1094 (1996). Nor do Respondents deny that the Second Circuit has followed *Gilbert* for nearly twenty years. They cite no case in that circuit which questions or distinguishes *Gilbert*'s relevant holding, because there is none. Petitioners' claims would have been exempted from the AIA if the Second Circuit had decided this case. *Gilbert*, 765 F.2d at 329.

2. Petitioners' claims also would have survived the AIA in the Sixth Circuit. That court held that ERISA satisfies the *Mitchum* and *Vendo* tests because it combines expansive preemption provisions with exclusive federal jurisdiction over actions brought by fiduciaries to "enjoin any act or practice which violates" the terms of an ERISA plan. *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980) ("We conclude that ERISA meets both prongs of the *Mitchum* test."). The Sixth Circuit held that ERISA authorizes an exception to the AIA whenever a state court

action would make it "impossible for a fiduciary ... to carry out its responsibilities under ERISA." 623 F.2d at 459.

The Fourth Circuit made no suggestion that Petitioners would not prevail under *Buha*.[3] Nevertheless, Respondents offer three reasons for their claim that successfully resolving their California state court action would not make it impossible for Petitioners to carry out their fiduciary responsibilities. None has any merit.

First, Respondents claim that their state court action is distinguishable from the state action in *Buha* because it does not seek recovery from an ERISA trust fund and they have not sued Denny's in its fiduciary capacity. Opp. 15. That argument relies on Respondents' assertion that Petitioners' plan is not an ERISA plan. If it is, as Petitioners have sufficiently alleged and this Court must therefore assume, then Denny's is an ERISA fiduciary that would be required under the "cease and desist order" sought by Respondents to pay benefits in violation of the terms of an ERISA plan. Pet. 4. Indeed, the Fourth Circuit assumed that Respondents' state court action would violate ERISA and nonetheless dismissed the case. Pet. App. 11a.

Second, Respondents assert that Petitioners' fiduciary responsibilities are not implicated because Petitioners have the opportunity to raise a preemption defense in state court, whereas no such opportunity was present in *Buha*. Opp. 15-16. Respondents incorrectly contend that the defendant in that state action was not an ERISA fiduciary and that there was no opportunity to raise a preemption defense. Opp. 15.

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[3] Respondents incorrectly contend that Judge Williams found that this complaint would have been dismissed in the Sixth Circuit. Judge Williams observed that "[i]f ERISA was an 'expressly authorized' exception to the AIA [when fiduciaries seek to prevent application of state law], then the AIA likely would not apply to this case as Denny's has argued emphatically *that it will be unable to carry out its responsibilities under ERISA* if it is subjected to California labor law." Pet. App. 21a (emphasis added). That is the rule that governs in *Buha*, but Judge Williams found that approach was "not available" after the Fourth Circuit's holding in *Employers Resource Management*. Pet. App. 21a.

To the contrary, the defendant in the state court action at issue in *Buha* was a bank that served as an ERISA trustee of General Motors' pension fund. 623 F.2d at 457. The trustee accordingly could have raised a preemption defense, and there was no suggestion that General Motors could not have intervened in the state suit.

More important, the Sixth Circuit did not hold that the availability of a preemption defense is the test for whether a fiduciary can carry out its duties under ERISA. It held that the "equitable character" of an ERISA plan is directly implicated when "state and local laws ... might frustrate its goals." *Id.* at 459. As *Buha* recognized, Congress gave fiduciaries the right to seek federal court protection from state enforcement actions that violate ERISA's preemption provisions. *Id.*; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) ("Congress presumably determined that a right to enter federal court was necessary to further [ERISA's] purposes."). As the Fourth Circuit explained below, that right of fiduciaries to bring federal actions is important because a state suit may violate ERISA even if a fiduciary can raise a preemption defense. *See* Pet. App. 11a ("[A] state suit to enforce a state law against an ERISA plan may well violate ERISA and the plan."). When a plan's fiduciary is threatened with a state enforcement action, it faces a "Hobson's choice." *Id.* It must either "obey the state law, and risk violating the provisions of the plan []and hence ERISA ... or disobey the state law and then raise 'ERISA preemption as a defense ...' and 'risk breaking the [state] law.'" *Id.* (citation omitted). Neither of those options is acceptable. COC Br. 5 (fiduciaries "are bound to act in the interest of the participants and beneficiaries of the plan at all times ... they do not have the luxury of waiting to be sued by state authorities for violations of state law"). The only way for Petitioners to ensure they are carrying out their fiduciary duties is to seek declaratory and injunctive relief in federal court.

Third, Respondents argue that Petitioners' vacation benefits policy does not qualify as an ERISA plan and that

"[s]uch a finding is required under *Buha*." Opp. 16. That argument is ironic given that Petitioners brought their federal action precisely to litigate the merits of that question. More to the point, the ultimate resolution of that issue is irrelevant to this Court's analysis of the petition. Petitioners' federal complaint sufficiently alleges, with supporting facts, that Petitioners maintain and administer an ERISA plan. The courts below properly accepted those well-pleaded facts as true and construed them in Petitioners' favor. *See* Fed. R. Civ. P. 8(f); Pet. App. 7a n.4 ("presum[ing] Denny's is an ERISA fiduciary" without drawing "any conclusion as to the merits of Denny's allegation that the Plan is an ERISA plan"). Because this case arises on appeal from a motion to dismiss, this Court, too, assumes the truth of Petitioners' well pleaded facts and construes them in their favor. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993) ("Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true."). Respondents do not suggest that the Fourth Circuit erred on this point, and their challenge to the status of Petitioners' plan is therefore misplaced.[4] Thus, this case squarely presents the opportunity for this Court to resolve the circuit conflict stemming from the confusion

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[4] Respondents' reliance on the Department of Labor's advisory opinion is inappropriate because it relates to the merits of the action, not the availability of relief under the AIA. In fact, the opinion does not resolve the question whether Petitioners' plan is an ERISA plan, as Respondents claim. *Compare* Opp. App. 32 (concluding that "the Department is unable to conclude that the Plan is an employee benefit plan within the meaning of ERISA section 3(1)") *with* Opp. 16. Even if the opinion were adverse to Petitioners, Respondents cannot rely on it as an authoritative agency interpretation. *See* Opp. App. 32 (citing ERISA Procedure 76-1, § 10, which states that only parties requesting opinion—here, Petitioners—may rely upon it). Moreover, Respondents misstate the opinion's reasoning. The opinion suggests (without support) that vacation benefit policies may not qualify as ERISA plans if they do not require advance actuarial funding, which contradicts the plain text of ERISA, 29 U.S.C. § 1081, and would deny ERISA status to numerous types of benefit policies that are widely believed to qualify as ERISA plans.

created by *Mitchum* and *Vendo* in the ERISA context; to determine whether ERISA ever authorizes an exception to the AIA; and to determine the nature of the claims that fall within the scope of that exception.

III. IN OTHER CIRCUITS THE AIA WOULD NOT BAR ALL RELIEF PETITIONERS REQUEST

1. Respondents argue that Petitioners have not met the requirements established in *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). The Third Circuit held that the AIA does not bar declaratory relief if the state suit turns on a question of federal law; federal courts are generally more experienced in handling that question; and the state court "manifests willingness to hold its hand pending [a] federal decision" on that question. *Id.* at 1332. *First*, as Respondents recognize, their state court action turns on the federal question of whether ERISA preempts California's vacation pay statute. *Second*, federal courts are "likely to be more familiar and experienced" in handling ERISA actions. Even if state courts have jurisdiction over ERISA preemption defenses, Congress gave federal courts exclusive jurisdiction over suits brought by fiduciaries, which strongly suggests that those courts are better equipped to adjudicate the questions they present. COC Br. 10. *Third*, declaratory relief here could not have the same effect as a "stay" of the proceedings—as the AIA's text requires—because the state court made its own decision to stay the proceedings *three times*. That stay remains in effect. This case therefore meets all of the conditions set forth by the *Thiokol* court.

2. The Fifth Circuit also would have authorized declaratory relief in this case. In *Travelers Insurance Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774 (5th Cir. 1993), the court held that the AIA does not bar declaratory relief "consistent with the purposes of the Declaratory Judgment Act [("DJA")]." *Id.* at 777. Petitioners filed suit in federal court to clarify the nature of their fiduciary responsibilities and to prevent a multiplicity

of suits in more than thirty-six states. Pet. 27. Those purposes are consistent with the aims of the DJA, which, as most federal courts have recognized, was designed to promote judicial economy by reducing legal uncertainty. *See, e.g., Kunkel v. Continental Cas. Co.*, 866 F.2d 1269, 1275 (10th Cir. 1989) (holding that "a court in the exercise of its discretion should declare the parties' rights and obligations when the judgment will (1) clarify or settle the legal relations in issue and (2) terminate or afford relief from the uncertainty giving rise to the proceeding").

Respondents dispute that conclusion by claiming that Petitioners engaged in "procedural gamesmanship" by selecting the district court as the forum for their action. Respondents cannot be referring to Petitioners' choice of a federal forum, which is required under ERISA. 29 U.S.C. § 1132(e)(1). Nor can Respondents seriously complain about Petitioners' geographic choice of South Carolina. ERISA's venue provisions plainly authorize fiduciaries to bring actions "in the district where the plan is administered," and Petitioners' plan is administered in South Carolina. *Id.* § 1132(e)(2). Moreover, Respondents' claim that this action was filed in South Carolina to "nullify the other party's advantage in state court," Opp. 20, rings hollow.[5] There was no state court suit pending when Petitioners filed their federal claim, so Respondents never enjoyed any "advantage." Petitioners' claims for declaratory relief, prohibited by the Fourth Circuit, would have been permitted in the Third and Fifth Circuits. This Court should grant certiorari to resolve that conflict and clarify what types of declaratory relief, if any, the AIA reaches.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the petition for certiorari should be granted.

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[5] Respondents' assertion also begs interesting questions: Why did Respondents have an "advantage" in state court? And is requiring ERISA fiduciaries to litigate their ERISA claims in a disadvantageous state court forum consistent with ERISA's fundamental goals?

Respectfully submitted,

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